

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case Nos.: 00-O-14412-RAH ;
)	03-O-02970; 05-O-03374 (Cons.)
GAIL JUDITH HIGGINS,)	
)	DECISION AND ORDER SEALING
Member No. 164989,)	CERTAIN DOCUMENTS
)	
<u>A Member of the State Bar.</u>)	

On December 1, 2003, the State Bar of California, Office of the Chief Trial Counsel (“State Bar”), filed a Notice of Disciplinary Charges against respondent **Gail Judith Higgins** (“respondent”) in Case No. 00-O-14412.

Respondent sought to participate in the State Bar Court’s Alternative Discipline Program (“ADP”), and on January 9, 2004, this matter was referred to the ADP.¹

On October 29, 2004, respondent submitted a declaration establishing a nexus between her mental health issue and her misconduct. The parties entered into a Stipulation Re Facts and Conclusions of Law which was received by the State Bar Court on April 15, 2005.²

On July 15, 2005, the court lodged the Statement on Alternative Dispositions and Orders, the Contract and Waiver for Participation in the State Bar Court’s ADP (“Contract”), and the

¹ This program was earlier referred to by other names.

² This stipulation included investigative case number 03-O-02970.

parties' Stipulation Re Facts and Conclusions of Law. On July 19, 2005, the court issued an order formally accepting respondent into the ADP.

On May 19, 2006, the State Bar, filed another Notice of Disciplinary Charges against respondent in Case No. 05-O-03374. This case was referred to ADP upon respondent's request.

On December 7, 2007, the court received an addendum supplementing the Stipulation Re Facts and Conclusions of Law to include Case No. 05-O-03374. On December 21, 2007, respondent submitted an amended declaration establishing a nexus between her mental health issue and her misconduct.

On June 3, 2008, the court lodged orders amending the Statement on Alternative Dispositions and Orders and the Contract.

On January 13, 2010, the court issued an order finding that respondent has successfully completed the ADP. The parties' Stipulation Re Facts and Conclusions of Law and addendum thereto was filed, and this matter was submitted for decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Stipulation Re Facts and Conclusions of Law and addendum thereto, including the court's order approving the Stipulation Re Facts and Conclusions of Law, is attached hereto and hereby incorporated by reference, as if fully set forth herein.

The Stipulation Re Facts and Conclusions of Law and addendum thereto sets forth the factual findings, legal conclusions, and aggravating and mitigating circumstances in this matter. Below is an abbreviated summary of each of the three case numbers.

In Case No. 00-O-14412, respondent stipulated that she failed to comply with Business and Professions Code³ section 6068, subdivision (l), by failing to file four quarterly reports as required by the terms of an earlier Agreement in Lieu of Discipline. Respondent also stipulated

³ Future references to section(s) are to this source.

to violating section 6068, subdivision (m), by failing to promptly respond to her client's reasonable status inquiries.

In Case No. 03-O-02970, respondent was retained to represent clients in a bankruptcy proceeding. Respondent stipulated that she willfully failed to perform legal services with competence, in violation of rule 3-110(A) of the Rules of Professional Conduct,⁴ by not opposing or appearing at the hearing for a Motion for Relief from Automatic Stay.

In Case No. 05-O-03374, respondent was retained to represent a client in a bankruptcy proceeding. In this matter, respondent stipulated that she willfully: (1) failed to perform legal services with competence in violation of rule 3-110(A); (2) failed to promptly refund unearned fees in violation of rule 3-700(D)(2); (3) failed to promptly refund advanced costs in violation of rule 4-100(B)(4); (4) failed to promptly respond to her client's reasonable status inquiries in violation of section 6068, subdivision (m); and (5) failed to cooperate in a disciplinary investigation in violation of section 6068, subdivision (i).

In mitigation, respondent had no prior record of discipline, she displayed candor and cooperation with the State Bar, and she was suffering from severe financial stress at the time of the misconduct. In aggravation, respondent committed multiple acts of misconduct.

Supreme Court and Review Department case law establish that extreme emotional difficulties are a mitigating factor where expert testimony establishes that these emotional difficulties were directly responsible for the misconduct, provided that the attorney has also established, through clear and convincing evidence, that he or she no longer suffers from such difficulties. (*Porter v. State Bar* (1990) 52 Cal.3d 518, 527; *In re Naney* (1990) 51 Cal.3d 186, 197; *In re Lamb* (1989) 49 Cal.3d 239, 246; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.) However, the Supreme Court has also held that, absent a

⁴ All further references to rule(s) are to this source unless otherwise indicated.

finding of rehabilitation, emotional problems are not considered a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney, supra*, 51 Cal.3d at p. 197.)

Respondent successfully completed the ADP. Respondent's successful completion of the ADP, which required her successful participation in the LAP, as well as the Certificate of One Year Participation in the Lawyer Assistance Program – Mental Health, qualify as clear and convincing evidence that respondent no longer suffers from the mental health issue which led to her misconduct. Accordingly, it is appropriate to consider respondent's successful completion of the ADP as a mitigating circumstance in this matter. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(e)(iv).)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney but, rather, to protect the public, to preserve public confidence in the legal profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

The parties submitted briefs on the issue of discipline. After considering the parties' briefs, including the case law and standards cited therein, the court advised the parties of the discipline that would be ordered if respondent successfully completed the ADP and the discipline which would be recommended to the Supreme Court if respondent was terminated from or failed to successfully complete the ADP.

In determining the appropriate discipline to recommend in this matter if respondent successfully completed the ADP, the court considered the discipline recommended by the parties, as well as standards 1.3, 1.4, 1.6, 2.2(b), 2.4, 2.6, and 2.10. The court also considered and distinguished *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, *Franklin v. State Bar* (1986) 41 Cal.3d 700, *Hulland v. State Bar* (1972) 8 Cal.3d 440, *Stuart v. State Bar* (1985) 40 Cal.3d 838,

In the Matter of Respondent G (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, and *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585.

After agreeing to the court's proposed high and low levels of discipline, respondent executed the Contract to participate in the ADP, and respondent's period of participation in the ADP commenced. Upon the inclusion of Case No. 05-O-03374, the court's proposed high and low levels of discipline were modified and respondent executed an amended Contract to participate in the ADP.

Thereafter, respondent successfully participated in the ADP and—as set forth in the court's January 13, 2010 order—successfully completed the ADP. Accordingly, the court recommends imposition of the discipline set forth in the amended Statement on Alternative Dispositions and Orders relating to a successful completion of the ADP.

RECOMMENDED DISCIPLINE

It is recommended that respondent **Gail Judith Higgins** be suspended from the practice of law for one year, that execution of that period of suspension be stayed, and that respondent be placed on probation for two years, subject to the following conditions:

1. Respondent must be actually suspended from the practice of law for the first 30 days of probation;
2. During the probation period, respondent must comply with the State Bar Act and the Rules of Professional Conduct;
3. Within thirty (30) days after the effective date of the discipline imposed in this matter, respondent must contact the State Bar's Office of Probation ("Office of Probation") and

schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of the discipline imposed in this matter. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in-person or by telephone. During the probation period, respondent must promptly meet with the probation deputy as directed and upon request;

4. Within ten (10) calendar days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including her current office address and telephone number, respondent must report such change in writing to both the Office of Probation and to the Membership Records Office of the State Bar;

5. Respondent must comply with all provisions and conditions of her Participation Agreement with the Lawyer Assistance Program ("LAP") and must immediately report any non-compliance to the Office of Probation. Respondent must provide an appropriate waiver authorizing the LAP to provide the Office of Probation and this court with information regarding the terms and conditions of respondent's participation in the LAP and her compliance or non-compliance with LAP requirements. Revocation of the written waiver for release of LAP information is a violation of this condition;

6. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the condition period. Under penalty of perjury, respondent must state in each quarterly report whether she has complied with the State Bar Act, the Rules of Professional Conduct, and all probation conditions during the preceding calendar quarter. If the first report will cover less than (30) days, that report must be submitted on the reporting date for the next calendar quarter and must cover the extended period. In addition to all the quarterly reports, respondent must submit a final report, containing the same

information required by the quarterly reports. The final report must be submitted no earlier than twenty (20) calendar days before the last day of the condition period and no later than the last day of the condition period;

7. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, all inquiries of the Office of Probation, which are directed to her personally or in writing, relating to whether respondent is complying or has complied with the probation conditions;

8. Within one year after the effective date of the discipline imposed in this matter, respondent must provide the Office of Probation with satisfactory proof of her attendance at a session of State Bar Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015, and passage of the test given at the conclusion of that session, unless, after admission into the Alternative Discipline Program, respondent provided the Office of Probation with satisfactory proof of attendance at a session of State Bar Ethics School and passage of the test given at the conclusion of such session.⁵ Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education (“MCLE”) requirement, and respondent will not receive MCLE credit for attending Ethics School (Rules Proc. of the State Bar, rule 3201.);

9. These probation conditions and the period of probation will commence upon the effective date of the Supreme Court’s final disciplinary order in this proceeding (Cal Rules of Court, rule 9.18.); and

⁵ See the court’s July 19, 2005 Order Regarding Respondent’s Evaluation for the Alternative Discipline Program.

10. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for one year will be satisfied and that suspension will be terminated.

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination (“MPRE”) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243 (telephone 319-337-1287), and provide proof of passage to the Office of Probation within one year⁶ after the effective date of the discipline herein.⁷

COSTS

It is recommended that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10, and such costs are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

DIRECTION RE DECISION AND ORDER SEALING CERTAIN DOCUMENTS

The court directs a court case administrator to file this Decision and Order Sealing Certain Documents. Thereafter, pursuant to rule 806(c) of the Rules of Procedure of the State Bar of California (“Rules of Procedure”), all other documents not previously filed in this matter are ordered sealed pursuant to rule 23 of the Rules of Procedure.

It is further ordered that protected and sealed material will only be disclosed to: (1) parties to the proceeding and counsel; (2) personnel of the Supreme Court, the State Bar Court

⁶ On July 19, 2005, the court issued an order allowing respondent to take the MPRE at any time after her admission into the ADP. There is no indication in the record that respondent has taken and passed the MPRE since her admission into the ADP. If respondent can demonstrate otherwise, she is ordered to provide such proof to the court with a timely motion for reconsideration (See Rules Proc. of State Bar, rule 224.). If no such motion is filed, the court will not disturb the present MPRE recommendation.

⁷ Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage. (But see Cal. Rules of Court, rule 9.10(b), and Rules Proc. of State Bar, rule 321(a)(1) and (3).)

and independent audiotape transcribers; and (3) personnel of the Office of Probation when necessary for their duties. Protected material will be marked and maintained by all authorized individuals in a manner calculated to prevent improper disclosure. All persons to whom protected material is disclosed will be given a copy of this order sealing the documents by the person making the disclosure.

IT IS SO ORDERED.

Dated: March _____, 2011

RICHARD A. HONN
Judge of the State Bar Court